UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

FISHER NUT COMPANY Employer

and Case 32-RC-5563

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL 5 Petitioner

Patrick W. Jordan, Esq., (Jordan Law Group), of San Rafael, California, for the Employer.

David Rosenfeld, Esq., (Weinberg, Roger & Rosenfeld), of Alameda, California, for the Petitioner.

ADMINISTRATIVE LAW JUDGE'S REPORT ON OBJECTIONS

Jay R. Pollack, Administrative Law Judge: Pursuant to Section 102.69 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, the Regional Director for Region 32 entered a Report and Recommendations on Objections, and ordered a hearing before an Administrative Law Judge. I heard the matter in Oakland, California, on July 11, July 31 and August 8, 2008.

The Representation Petition in this matter was filed by United Food and Commercial Workers International Union, Local 5 (the Union) on April 30, 2008.¹ Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 32 on May 15, an election by secret ballot was conducted on June 13 in the following unit:

All full-time and regular production and maintenance employees, shipping and receiving employees, and plant clerical employees employed by the Employer at its Modesto, California facility; excluding all seasonal employees, managerial and administrative employees, salespersons, office clerical employees, guards and supervisors as defined by the Act.

The Tally of Ballots served on all the parties at the conclusion of the balloting showed the following results:

Approximate number of	f eligible voters	34
Number of void ballots.		0

¹ All dates hereinafter refer to calendar year 2008.

Number of votes cast for Petitioner	20
Number of votes cast against participating labor organization	14
Number of valid votes counted	
Number of challenged ballots	0
Number of valid votes counted plus challenged ballots	

Thereafter, Fisher Nut Company, (the Employer) filed timely objections to the election, a copy of which was served on the Union by the Region. The Regional Director set for hearing the objections filed by the Employer:²

The Employer objects to the election based on the contention that "supervisors with meaningful authority over employees coerced and/or interfered with the employees' free choice in the election." Thus, the Employer seeks to set aside the results of the election and petitions for a rerun election. The Union contends that the Employer has failed to establish any evidence to supports its objections and contends that the objections should be dismissed.

It is undisputed that the parties stipulated that Liliana Duran, assistant plant manager, and Dora Valdez, sizing supervisor, were supervisors and not eligible to vote in the election. In the instant case the Union concedes that Duran was a supervisor but denies that Valdez possessed supervisory authority.

Prior to the election, Duran was the assistant to plant manager Joe Miceli.³ Duran had an office next to Miceli's along with her own desk and computer. Until May 15, she earned \$1.50 to \$2.50 per hour more than the employees she supervised. On May 15 she received a \$2.50 per hour raise and an additional week of paid vacation. The rank and file employees did not receive paid vacation.

Duran ran the plant when Miceli was not present. In addition, Duran reviewed job applications and made recommendations to Micelei as to whom to interview. Only those recommended by Duran were interviewed. Duran attended Miceli's interviews of the job applicants and then discussed with Miceli whom to hire.

Duran also made recommendations regarding seasonal layoffs and Miceli followed her recommendations. On one occasion, Miceli proposed laying off three or four employees but Duran voiced opposition. Miceli accepted Duran's recommendation and did not lay off any employees at that time.

After seasonal employees were hired, Duran conducted orientation meetings and training sessions. Duran had authority to move employees from one department to another in order to meet business needs. If an employee complained about such a move, Miceli always supported Duran's decision. Miceli also instructed employees to contact Duran when they had a request for time off or called in sick.

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² The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Manufacturing Company*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

³ Duran has since been terminated.

Duran was the contact person for the United States Department of Agriculture Inspector: She was required to be present for deliveries and would coordinate inspection and sampling and would be the one to respond to USDA concerns. Duran directed employees with respect to the unloading and obtaining samples to give to the USDA inspector.

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With respect to quality control, Duran was responsible for reviewing the quality control reports and, if there was a problem, she was to bring the issue to Ron Fisher, the Employer's president. Duran could remove an employee from quality control, re-run the product, or re-train quality control employees.

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One of Duran's significant duties was to create "pick orders" or "staging slips." To create a "pick order," Duran reviews data entered from the sizing and laser departments and the customer specifications then chooses among the various bins that will result in an order that meets customer specifications. After Duran creates the pick order, she delivers it to the forklift drivers who takes the chosen product from inventory and places it next to the sorting room. The Employer contends that with the power to create pick orders, Duran had the ability to increase labor hours. Miceli is now responsible for the creation of pick orders.

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Both Duran and Valdez attended weekly production staff meetings. Valdez was responsible for the sizing department which included 12 to 15 employees including forklift drivers, general laborers, quality control personnel and her assistant. She would train employees on the sizing machine, review quality control reports, direct general laborers and the forklift drivers, and regulate the rate at which the almonds were being sized.

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The credited testimony reveals that Valdez selected employees for her crew. When the season started Valdez would request the employees she wanted and Miceli would comply with her requests. At the time of the election, Valdez earned \$3.50 to \$4.50 more per hour than the employees on her crew. In addition, she received two weeks paid vacation while the other employees did not receive paid vacation.

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During the season, Valdez opened the plant at 4:00 a.m. every morning and was in charge until 6:00 a.m. when Miceli arrived. She conducted a morning meeting and assigned employees their positions. Valdez disciplined employees, reassigned them out of her department and in one instance sent an employee home.

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As the season winds down, Valdez worked in preventive maintenance with a staff of two to five employees. She directed these employees in changing out bearings, re-doing the gravity table, cleaning the electronics, replacing worn parts and painting equipment.

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Employee Maria Barazza testified that at a union meeting on April 30, employee Sandra Narancio stated that Duran sent word that she was together with the employees. According to Narancio, Duran did not want the employees to think that she was not on their side, that it was her job to be on the Company's side but that Duran was with the employees. Neither Narancio nor Duran testified at the hearing so this evidence is hearsay and I will not rely upon it. Valdez was at this meeting.

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On May 1, according to Barazza, Valdez and Duran entered the sorting room. In the presence of approximately 10 employees, Valdez said that there had been a union meeting the day before but that attendance had been poor. Valdez said that she hoped that at the next meeting the employees would be united 100 percent. According to Barazza, Duran then told the employees that she was with them and that she supported the Union.

During the following week, Barazza attended a union meeting at which both Valdez and Duran attended. During the third week of May, Barazza attended a meeting at the home of an employee's brother. Valdez attended this meeting. According to Barazza the union agent thanked Valdez for attending the meeting even though she was on vacation. Valdez said she was with the employees and supported them. According to Barazza the union agent asked Valdez how she would vote, if she could vote. Valdez said the employees should be united and be in favor of the Union. Narancio stated that Duran sent word that she was together with the employees. According to Narancio, Duran didn't want the employees to think that she wasn't on their side. Neither Narancio nor Duran testified at the hearing so this evidence is hearsay and I will not rely upon it.

Employee Dora Martinez testified that on May 1, Duran and Valdez came into the sorting room and turned off the conveyor belt. Duran said Valdez had something to say. Valdez stated that the employees had to be behind the Union 100 percent. D. Martinez attended a union meeting the following day. Valdez and Duran were present. According to D. Martinez, Duran asked questions about the benefits of a union. Duran said she was going to convince Ron Fisher, company president that she was on his side but that she was really on the employees' side. According to D. Martinez, the union agent stated that Duran could be more useful to the Union by working with the Company rather than by attending union meetings. According to Martinez Valdez also asked about union benefits and stated that the employees needed to be united. D. Martinez attended another meeting approximately a week later. According to D. Martinez, employee Narrancio said that Duran had spoken with the company labor consultant to lead him to believe that she was with the Company. According to D. Martinez, the union agent said it was more useful for Duran to be with the Company than to attend union meetings.

Employee Blanca Martinez testified that she signed a union authorization card and gave it to Duran. Duran said the card was serious and could not be mailed. B. Martinez testified that on the morning of May 1, Valdez and Duran entered the sorting room and turned off the conveyor belt. According to B. Martinez, Valdez said that she had attended a union meeting the previous day and a lot of employees did not attend. Valdez said it was necessary for all of the employees to attend. Valdez stated that the employees had to support the Union 100 percent. Duran said that she would support the Union 100 percent. B. Martinez attended a union meeting on May 2. Duran and Valdez were at the meeting. Duran said that she supported the employees. According to B. Martinez, the union agent said that Duran could help the Union by fooling the Employer into thinking that she supported the Company. B. Martinez attended a union meeting on or about May 8. According to B. Martinez the Union agent stated that Duran would no longer attend union meetings and that she would be more useful to the Union by leading the Employer to believe that she supported the Company.

Employee Louise Maria Costello testified that on the morning of May 1, Valdez and Duran entered the sorting room. Valdez said that only a few employees were attending union meetings and that all the employees should support the Union. Duran said that she would support the employees and that employees should attend the union meetings. Costell attended a union meeting on May 2. Valdez and Duran attended this meeting and asked questions about union benefits. Costello also attended a meeting at the house of an employee's brother. At this meeting, the union agent stated that Duran could not attend any more union meetings. Employee Narancio stated that Duran supported the Union. The union agent stated that Valdez was a supervisor and could not vote in the election. Valdez stated that she supported the Union.

Employee Nancy Rodriguez testified that Duran meet with her and said that Ron Fisher had given her a raise and that the employees should give Fisher a chance. Rodriguez was at two meetings held by Duran and the Employer's labor consultant in which Duran repeated that Fisher had given her a raise and that employees should give Fisher a chance, three other employees were present at these meetings.

Analysis

In Harborside Health Care, Inc., 343 NLRB 906 (2004) the Board formulated a two step inquiry to apply in cases involving objections to an election based on pro-union supervisory conduct:

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- 1) Whether the supervisor's pro-union conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election.
- This inquiry includes: a) consideration of the nature and degree of supervisory authority possessed by those who engage in the pro-union conduct and b) an examination of the nature, extent, and context of the conduct in question.
- 2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct. at 909.

The Board also pointed out, however, that it was "by no means suggesting that supervisory pro-union speech, without more, is objectionable." See *Harborside*, 343 NLRB at 911.

In Harborside, id, where the Board found objectionable supervisory pro-union conduct, the supervisor in question initiated discipline, assigned schedules, gave principal input on 30 evaluations, directly suspended employees, and effectively recommended suspension and termination. At least one employee testified in *Harborside* that the supervisor "could write you up and make you lose your job." Armed with such broad authority over the employees' day-today working conditions, the supervisor repeatedly told employees during the election campaign that they could lose their jobs if the union lost the election, initiated loud and intimidating 35 confrontations with employees to cajole them to support the union, and engaged groups of employees in discussions during which the supervisor made numerous references to the lack of job security. The supervisor also told employees that she was counting on them to vote for the union. Additionally, the supervisor solicited authorization cards from employees, pressured an employee to wear a union pin, solicited employee signatures on a union petition, and required at 40 least one employee to attend union meetings.

In the instant case there is no evidence of solicitation of authorization cards by either Duran or Valdez. Duran received a signed card from another employee but had not solicited the card. While Duran and Valdez supported the Union before a group of employees, no threats or promises were made. Duran and Valdez then attended a union meeting but again no threats or promises were made. Thereafter, Valdez, a low level supervisor attended a union meeting at which it was stated that she could not vote in the election. Again, no threats or promises were made.

In *Northeast Iowa Telephone Co.*, 346 NLRB No. 47 (2007) the Board found that the plant and wireless managers' pro-union conduct did not reasonably tend to coerce or to interfere

with employee free choice. The Board assumed that the plant and wireless managers were statutory supervisors, but noted that they did not wield the full panoply of supervisory authority. Neither manager had ever disciplined a technician or been involved in a technician's termination or suspension. Further, to the extent that either manager was responsible for scheduling technicians, the scheduling appeared to be of a routine nature. The strongest evidence of supervisory authority was in the areas of effective recommendation to hire and to grant wage increases pursuant to the annual evaluation process.

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With respect to the managers' prounion conduct, it is undisputed that the conduct was limited to attending union meetings, participating in discussions at those meetings, signing authorization cards in front of employees, and mentioning some of the issues that a union could help resolve, such as the fairness of scheduling, overtime, and layoffs. The Board found such prounion activity markedly differs from that in *Harborside*.

The Board found that the conduct of the managers in *Northeast Iowa Telephone* did not approach the extensive and intimidating pro-union conduct engaged in by the high-level supervisor in *Harborside*. To the extent that the managers possessed supervisory authority, the employee technicians were affected by it in two limited circumstances—at their initial hiring and during the annual evaluation process. Further the managers' pro-union conduct was limited at best. The managers attended meetings held in employees' homes, spoke at those meetings along with the other attendees, signed authorization cards in front of other employees, and mentioned some of the potential issues that a union could help resolve. The Respondent did not allege that the managers solicited authorization cards from other employees. Accordingly, the managers' pro-union conduct coupled with their limited supervisory authority did not reasonably tend to coerce or to interfere with employee free choice.

Further, the Board found that even assuming that the managers' conduct was objectionable, it did not materially affect the outcome of the election. While the Union's two-vote margin of victory might support such a finding that the managers' conduct could have materially affected the outcome of the election, other relevant factors lead the Board to the opposite conclusion. First, the managers' conduct appeared to have been isolated. Concededly, the managers attended a number of union meetings, engaged in limited discussions with employees about the campaign, and signed authorization cards in front of other employees. However, there was no evidence that the managers signed their cards in front of employees under their supervision. The only pro-union conduct directed by the managers to the technicians under their supervision was the plant manager's statements (1) that if the employees felt that they should vote for the Union then they should vote for the Union and (2) that if the Union won it could help resolve issues regarding overtime, compensatory time, and layoffs. The first statement is not itself an endorsement of the Union and the second is merely a statement of the potential benefits of collective bargaining. Further, this is not a case in which employer representatives were pro-union during the organizing campaign such that the prounion sentiments of a supervisor might be attributed to the employer and their effect on the election compounded. Instead, the Respondent made clear to the employees during the campaign that the Union was not necessary. Accordingly, to the extent that plant manager's statements could be viewed as pro-union they are less likely to be attributed to the Respondent. Further, the Respondent's admitted antiunion stance would have served to mitigate the supervisor's conduct in this case given the limited nature of their conduct and of their authority. Based on these facts, we conclude that the managers' pro-union conduct, even if it were objectionable, did not materially affect the outcome of the election, despite the small margin of victory.

The Board went on to state that the fact that an employer is pro-union or antiunion will not itself render an election invalid. The Board stated that *if* an employer expresses an antiunion view, that may mitigate a supervisor's pro-union coercive conduct. However, the fundamental issue remains the same. That issue is whether a supervisor's pro-union actions have interfered with employees' exercise of their Section 7 right to choose whether or not to be represented. When supervisors inject themselves in the debate in a coercive manner, employee free choice may well be inhibited.

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Based on *Northeast Iowa Telephone* I find that the conduct of Valdez and Duran did not reasonably tend to interfere with employees free choice in the election process. I further find that their conduct did not materially affect the outcome of the election.

Conclusions and Recommendations

I recommend that the Employer's objections to conduct affecting the results of the election be overruled and that the Union be certified as the duly elected representative of all employees in the stipulated appropriate bargaining unit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

ORDER4

The Employer's objections to conduct affecting the results of the election in the above matter are overruled. The Regional Director for Region 32 shall certify the Petitioner as the collective-bargaining representative of employees in the appropriate unit.

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35				Jay R. Pollack Administrative Law Judge

Dated, Washington, D.C. September 10, 2008

⁴ Any party may, under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C. by September 24, 2008.